STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH LAMAR CAMPBELL,

Plaintiff-Appellee,

v

KROGER, INC., RAMCO-GERSHENSON, INC., and RAMCO-GERSHENSON PROPERTIES, L.P.,

Defendants,

and

RAMCO-GERSHENSON PROPERTIES TRUST,

Defendant/Cross-Plaintiff,

and

TURF TENDERS LANDSCAPING AND FERTILIZING, INC.,

Defendant/Cross-Defendant-Appellant.

UNPUBLISHED
March 15, 2011

No. 295376
Wayne Circuit Court
LC No. 09-002370-NO

DEBORAH LAMAR CAMPBELL,

Plaintiff-Appellee,

v

KROGER, INC., RAMCO-GERSHENSON, INC., and RAMCO-GERSHENSON PROPERTIES, L.P.,

Defendants-Appellants,

and

No. 296309
Wayne Circuit Court
LC No. 09-002370-NO

RAMCO-GERSHENSON PROPERTIES TRUST,

Defendant/Cross-Plaintiff-
Appellant,

and

TURF TENDERS LANDSCAPING AND
FERTILIZING, INC.,

Defendant/Cross-Defendant.

Before: CAVANAGH, P.J., and JANSEN and SERVITTO, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal by leave granted the trial court orders denying their summary disposition motions in this premises liability action. We reverse and remand.

Plaintiff slipped and fell on an icy/snowy sidewalk leading to a Kroger store in December 2008, incurring injuries. Plaintiff brought suit against the owner/possessor of the Kroger store, the owners/possessors of the plaza in which the store was located, and Turf Tenders Landscaping and Fertilizing, Inc., the snow removal contractor for the property, presenting a claim of premises liability and alleging negligence and various code violations on defendants' part. Defendants separately moved for summary disposition in their respective favors, and the trial court denied the motions.

I. DOCKET NO. 295376

In Docket No. 295376, defendant/cross-defendant, Turf Tenders Landscaping and Fertilizing, Inc. ("Turf Tenders"), argues that the trial court erroneously denied summary disposition in its favor because it did not owe a duty to plaintiff. We agree.

We review de novo a trial court's ruling on a motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Although Turf Tenders moved for summary disposition under both MCR 2.116(C)(8) and (C)(10), the trial court denied the motion under subrule (C)(10), finding that there existed a question of material fact for trial. A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all of the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for trial. *Id*. at 31.

A prima facie negligence claim requires a plaintiff to prove four elements: (1) duty; (2) breach; (3) causation; and, (4) damages. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). The threshold question is whether the defendant owed a duty to the plaintiff because, absent a duty, there can be no tort liability. *Id.*

Our Supreme Court addressed a similar situation in *Fultz*, 470 Mich at 462, where the plaintiff fell and injured her ankle while walking across the defendant "Comm-Co's" snowy and icy parking lot. Comm-Co had entered into a contract with another defendant, "CML," to provide snow and salt services, but CML did not plow or salt the parking lot during the 14 hours preceding the plaintiff's fall. The plaintiff filed negligence claims against both CML and Comm-Co. *Id.* Our Supreme Court held:

> [L]ower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie. [*Id.* at 467.]

Because the plaintiff failed to establish that CML owed her a duty independent of its contract with Comm-Co, the Supreme Court determined that CML was not liable for her injuries. *Id.* at 468.

This case presents the same scenario. Turf Tenders owed Ramco-Gershenson[1] a contractual duty to remove snow and ice from the sidewalk area. Despite that plaintiff was not a party to the contract, she essentially claimed that she was injured by Turf Tenders's failure to perform its duties under the contract. Pursuant to *Fultz*, plaintiff's argument is unsuccessful because she failed to identify a duty that Turf Tenders's owed her independent of its snow removal contract with Ramco-Gershenson.

Plaintiff argues that this case is distinguishable from *Fultz* because she is a third-party beneficiary of the snow removal contract. Her argument lacks merit. "A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise 'directly' to or for that person." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003); see also MCL 600.1405. When a contract is primarily for the benefit of the parties, a third person's incidental benefit from the contract does not accord that person third-party beneficiary status. *Oja v Kin*, 229 Mich App 184, 193; 581 NW2d 739 (1998). Rather, "[t]hird-party beneficiary status requires an express promise to act to the benefit of the third-party[.]" *Dynamic Constr Co v Barton Malow Co*, 214 Mich App 425, 428; 543 NW2d 31 (1995). "[O]nly intended, not incidental, third-party beneficiaries may sue for a breach of a

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[1] For the sake of simplicity, we refer to defendants, Ramco-Gershenson, Inc., Ramco-Gershenson Properties, L.P., and defendant/cross-plaintiff Ramco-Gershenson Properties Trust, collectively, as "Ramco-Gershenson."

contractual promise in their favor." *Schmalfeldt*, 469 Mich at 427. A third-party beneficiary need not be referenced by name in a contract and may be a member of a class as long as the class of persons is reasonably identified. *Brunsell v City of Zeeland*, 467 Mich 293, 297; 651 NW2d 388 (2002).

The snow removal contract between Turf Tenders and Ramco-Gershenson does not contain an express promise directly benefiting a particular class of persons. Thus, plaintiff is not an intended third-party beneficiary of the contract. Plaintiff's reliance on *Vanerian v Charles L Pugh Co, Inc*, 279 Mich App 431; 761 NW2d 108 (2008), is misplaced. In that case, G & G Floor Company ("G & G") and Charles L. Pugh Company, Inc., entered into a contract whereby G & G agreed to replace the plaintiff's basement floor. *Id.* at 432-433. The contract was entitled "Marie Vanerian Residence" and specified the work to be performed to remove water damaged items and install new flooring. *Id.* at 433. In determining that the plaintiff was an intended third-party beneficiary of the contract, this Court reasoned that the singular purpose of the contract was directly for her benefit and that the contract expressly referenced her by name. *Id.* at 436, 439. Unlike *Vanerian*, the snow removal contract here did not reference plaintiff and its purpose was not directly for her benefit.

Plaintiff also contends that this case is distinguishable from *Fultz* because the International Property Maintenance Code and standards promulgated by the Building Officials & Code Administrators International, Inc. ("the BOCA Code") required Turf Tenders to maintain the sidewalk free from hazardous conditions. Plaintiff argues that Turf Tenders assumed the duty to abide by those codes when it executed its contract with Ramco-Gershenson. Even if Turf Tenders assumed such duties by entering into the contract, however, plaintiff failed to show that Turf Tenders owed her a duty separate and distinct from the contract. Indeed, plaintiff's argument that Turf Tenders acquired the duties by executing the contract belies her claim that it owed her duties independent of the contract. Because Turf Tenders owed plaintiff no duty separate and distinct from the snow removal contract, she cannot maintain a tort claim against Turf Tenders. *Fultz*, 470 Mich at 467. The trial court erred by denying Turf Tenders's motion for summary disposition.

II. DOCKET NO. 296309

In Docket No. 296309, defendants, Kroger, Inc. ("Kroger") and Ramco-Gershenson, argue that the trial court erroneously denied their motion for summary disposition because the hazardous condition that caused plaintiff's fall was open and obvious. We agree.

"In general, a premises possessor owes a duty to an invitee[2] to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (footnote added).

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[2] Michigan law recognizes a person on a premises for reasons directly tied to the property owner's commercial business interests as an invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604; 614 NW2d 88 (2000).

This duty does not extend to open and obvious dangers, however, unless a "special aspect" of the condition makes even an open and obvious risk unreasonably dangerous. *Id.* at 517. In such cases, the premises possessor has a duty to take reasonable measures to protect invitees from the risk. *Id.*

"Whether a danger is open and obvious depends upon whether it is reasonable to expect an average [person] with ordinary intelligence to discover the danger upon casual inspection." *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). The test is objective and does not involve whether a particular plaintiff should have known that a condition was hazardous. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 713; 737 NW2d 179 (2007). Rather, the test looks to whether a reasonable person in the plaintiff's position would have foreseen the danger. *Id.*

In *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 67; 718 NW2d 382 (2006), this Court held "as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." See also *Royce v Chatwell Club Apartments*, 276 Mich App 389, 394; 740 NW2d 547 (2007) ("[T]he potential danger posed by the snow-covered parking lot was open and obvious even absent some other factor suggesting that the surface was slippery."). Although the trial court denied Kroger and Ramco-Gershenson's motion for summary disposition on the basis that there was no snow covering the ice, the record does not support the court's reasoning. Plaintiff testified that she was unable to see the pavement markings because snow covered the ground and she felt the ice under the snow only after she fell. She further testified that a photograph of the area did not accurately depict the condition that existed at the time of her fall because there was not enough snow in the photo.

Plaintiff relies on *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474; 760 NW2d 287 (2008), in support of her argument that the danger was not open and obvious. Her reliance is misplaced, however, because that case involved black ice that was not covered with snow. *Id.* at 475. Because the record here shows that plaintiff fell on snow-covered ice, the danger was open and obvious as a matter of law. *Ververis*, 271 Mich App at 67.

Plaintiff also argues that questions of fact exist regarding whether Kroger and Ramco-Gershenson breached duties owed under the International Property Maintenance Code, which was applicable pursuant to §101.4.5 of the Michigan Building Code. This Court has previously recognized that code violations may provide evidence of negligence, but "even in cases of code violations, the relevant inquiry remains whether any special aspects rendered the otherwise open and obvious condition unreasonably dangerous." *Kennedy*, 274 Mich App at 720. "In other words, even when a hazardous condition results from a code violation, the critical inquiry is whether there is something unusual about the alleged hazard that gives rise to an unreasonable risk of harm." *Id.* (citation and brackets omitted).

Even assuming that the snow-covered ice violated the International Property Maintenance Code, plaintiff fails to show that there was an unusual aspect of the condition that gave rise to an unreasonable risk of harm. She contends that she was unable to see the ice because it was underneath snow, but it is well known that "ice frequently forms beneath snow." *Ververis*, 271 Mich App at 65 (citation and punctuation omitted).

Plaintiff further argues that a special aspect of the condition precluded operation of the open and obvious doctrine.

> [W]ith regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Lugo*, 464 Mich at 517-518.]

To prevent the application of the open and obvious doctrine "to a typical and obvious condition, the condition must be 'effectively unavoidable' or 'unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm.'" *Kennedy*, 274 Mich App at 716, quoting *Lugo*, 464 Mich at 518.

Plaintiff contends that the danger was effectively unavoidable because she took the closest and most direct route to the store entrance, and the only other entrance was farther away and equally hazardous. We disagree.

In *Lugo*, 464 Mich at 518, our Supreme Court opined that an unavoidable risk may exist, for example, where the floor of the sole exit of a commercial building is covered with standing water, requiring persons to enter and exit through the water. Here, plaintiff "was not effectively trapped inside a building so that she *must* encounter the open and obvious condition in order to get out." *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002) (emphasis in original). Moreover, nothing in the record indicates that plaintiff could not have patronized the Kroger store on a different day when the weather had improved. See *id.*

Further, the evidence does not indicate that the parking lot and sidewalk area was "a sheet of ice" as was the condition in *Robertson v Blue Water Oil Co*, 268 Mich App 588, 590; 708 NW2d 749 (2005). In that case, this Court determined that "there was clearly no alternative, ice-free path from the gasoline pumps to the service station." Consequently, "[t]he ice was effectively unavoidable." *Id.* at 593-594. This case does not present such circumstances. Because plaintiff failed to establish a genuine issue of material fact regarding whether there existed a special aspect that precluded application of the open and obvious doctrine, the trial court erred by denying summary disposition for Kroger and Ramco-Gershenson.

Considering our holding on this issue, we need not address whether Kroger was entitled to summary disposition on the basis that it lacked possession and control over the premises.

Reversed and remanded for entry of summary disposition in defendants' favor. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Deborah A. Servitto